

CHAW ANUI

a

v.

TAN KIM CHAI

HIGH COURT MALAYA, SHAH ALAM

b

LOW HOP BING J

[PETITION NO: MT3-33-126-1999]

2 OCTOBER 2001

CIVIL PROCEDURE: *Amendment - Leave to amend - Facts and circumstances - Whether application was bona fide - Whether there was change in character of the ancillary relief sought in petition - Whether there was injustice caused - Whether parties still at liberty to apply for witnesses to be recalled - Rules of the High Court 1980, O. 20 r. 5(1) - Evidence Act 1950, s. 138(4)*

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This was the petitioner's application in encl. 49 for leave to amend her petition. The petitioner relied on r. 15 of the Divorce and Matrimonial Proceedings Rules 1980 ('the Rules') and O. 20 r. 5(1) of the Rules of the High Court 1980 (RHC) in giving the court the discretion to grant leave to amend a petition or pleading. The issues that arose were: (i) whether the application was *bona fide*; (ii) whether the prejudice to the other party could be compensated with costs and (iii) whether the effect of the amendment would change the character of a suit to a suit of a different and inconsistent character.

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Held:

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[1] The proposed amendment to the petitioner's petition pertains to the matters which are relevant and therefore have to be resolved by the court in respect of the ancillary relief sought by the petitioner and are *bona fide*. The prejudice if any caused to the respondent can be compensated with costs. There was no change in the character of the ancillary relief sought in the petition. (p 84 d-e)

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[1a] The case of *Abdul Johari Abdul Rahman v. Lim How Chong & Ors*, stated that however late the proposed amendment, it should be allowed if it can be made without injustice to the other side, and that there is no injustice if the other party can be compensated with costs. (p 84 g)

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[2] The proposed amendment consists of allegations of facts which have to be established by way of proper *viva voce* evidence. Although it is true that the petitioner has given her evidence, the law allows the petitioner to be recalled for examination in chief, cross-examination and re-

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- a* examination pertaining to the proposed amendment. Parties are still at liberty to apply to the court for other witnesses to be called or recalled to adduce relevant and admissible evidence: s. 138(4) Evidence Act 1950. (p 84 f)
- b* [Leave granted to the petitioner.]
- Case(s) referred to:**
Abdul Johari Abdul Rahman v. Lim How Chong & Ors [1997] 1 CLJ 361 (**refd**)
Abu Bakar v. Mohamed Zain [1967] 1 MLJ 168 (**refd**)
Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126; [1987] CLJ (Rep) 126 (**refd**)
- c* *Lembaga Pelabuhan Johor v. The Pacific Bank Bhd* [1998] 1 CLJ 742 (**refd**)
Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 (**refd**)
- Legislation referred to:**
- d* Divorce and Matrimonial Proceedings Rules 1980, rr. 3, 15
Evidence Act 1950, s. 138(4)
Rules of the High Court 1980, O. 20 rr. 5(1), 7
- For the petitioner* - Ramdas Tikamdas (Ashok Vijay); M/s Latip & Assocs
For the respondent - YN Foo (Faridah Abdullah); M/s YN Foo & Partners
- e* Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

- f* **Application**
This is the petitioner's application in encl. (49) for leave to amend her petition dated 27 April 1999 in accordance with the proposed amendments as in annexure A, on the grounds that:
- g* (a) it is just and proper to do so to reflect with more clarity and precision all the properties and shares held by the respondent and the petitioner during the term of their marriage and the additional facts as to the petitioner's experiences;
- h* (b) the application is *bona fide* and it does not turn the suit from one character into a suit of another and inconsistent character;
- (c) there is no prejudice or injustice caused to the respondent; and
- (d) in the alternative, if any prejudice or injustice is caused to the respondent it can be compensated with costs.
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Submission For Petitioner

Encik Ramdas Tikamdas and Encik Ashok Vijay, both learned counsel for the petitioner, confined their submissions to para. 7 of the proposed amendment, as the respondent did not resist the rest of the proposed amendment.

The petitioner relied on r. 15 of the Divorce and Matrimonial Proceedings Rules 1980 and O. 20 r. 5(1) of the Rules of the High Court 1980 both of which give the court the discretion to grant leave to amend a petition or pleading, as the case may be. In particular reference to para. 7 of the proposed amendment, it was submitted for the petitioner that para. 7 sought to explain the matrimonial assets on which the petitioner was making her claim and also the respondent's deeds during the marriage in question and prays for an order in terms of encl. (49).

Respondent's Contention

Cik Y.N. Foo and Cik Faridah Abdullah, both learned counsel for the respondent, contended that the marriage has been dissolved, leaving the issue of ancillary relief to be resolved by the court. Further, the petitioner has closed her case and the respondent is in the midst of adducing his evidence in chief. They opined that the amendment would be prejudicial to the respondent who cannot be compensated with costs, citing *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC, in support thereof.

They added that the proposed amendment consisted of allegations of facts which were within the petitioner's knowledge at the time of the presentation of the petition and that the petitioner has occasioned an unexplained delay of two years two months and one day.

On the specific areas of amendment, it was contended for the respondent that para 7(2) has changed the petitioner's position, while the proposed amendment to para 7(3) is contrary to her own evidence. According to respondent's learned counsel, the proposed amendment to para 7(5) and (7) was sought to introduce new facts which were not raised in the petitioner's petition, while the proposed para 7(8) is devoid of any basis or justification. They contended that para 7(10), by way of proposed amendment, would alter the conduct of her pleadings and hence contradictory thereto. They then submitted that the proposed amendment to para 7(26) cannot be allowed as on the date of the presentation of the petition on 24 July 1999, the interim protection order dated 19 May 1999 has not been obtained yet. In the circumstances, they urged the court to dismiss encl. (49) with costs.

a Decision Of The Court

The law relating the grant or refusal of leave to amend a petition as in the instant case is governed by the detailed provisions of r. 15 of the Divorce and Matrimonial Proceedings Rules 1980 in the following words:

- b** 15 Supplemental petition and amendment of petition
- (1) A supplemental petition may be filed only with leave.
- (2) A petition may be amended without leave before it is served but only with leave after it has been served.
- c** (3) Subject to paragraph (4), an application for leave under this Rule:
- (a) may, if every opposite party consents in writing to the supplemental petition being filed or the petition being amended, be made *ex parte* by lodging in the court office the supplemental petition or a copy of the petition as proposed to be amended; and
- d** (b) shall, in any other case, be made on notice (or in the High Court by summons), to be served, unless otherwise directed, on every opposite party.
- (4) The registrar may, if he thinks fit, require an application for leave to be supported by an affidavit.
- e** (5) An order granting leave shall:
- (a) where any party has given notice of intention to defend, fix the time within which his answer must be filed or amended; or
- f** (b) where the order is made after directions for trial have been given, provide for a stay of the hearing until after the directions have been renewed.
- (6) An amendment authorised to be made under this Rule shall be made by filing a copy of the amended petition.
- g** (7) Rules 9 and 11 shall apply to a supplemental or amended petition as they apply to the original petition.
- (8) Unless otherwise directed, a copy of a supplemental or amended petition, together with a copy of the order (if any) made under this Rule shall be served on every respondent and corespondent named in the original petition or in the supplemental or amended petition.
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- (9) The petitioner shall file the documents required by paragraph (8) to be served on any person and thereupon, unless otherwise directed, Rule 12 shall apply in relation to that person as it applies in relation to a person required to be served with an original petition.
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Rule 15 gives the court the discretion to amend a petition, after it has been served, with leave of the court. Rule 3 of the Divorce and Matrimonial Proceedings Rules 1980 allows the provisions of eg, the Rules of the High Court 1980 to be used, in the following words:

3 Application of other rules

- (1) Subject to these Rules and to any other written law, the Subordinate Courts Rules 1980 and the Rules of the High Court 1980 shall apply with necessary modifications to the commencement of matrimonial proceedings in, and to the practice and procedure in matrimonial proceedings pending in the Sessions Court and in the High Court respectively.
- (2) For the purposes of paragraph (1), any provision of these Rules authorising or requiring anything to be done in matrimonial proceedings shall be treated as if it were, in the case of proceedings pending in the High Court, a provision of the Rules of the High Court 1980.

The procedure governing the amendment of a writ or pleadings is contained in O. 20 r. 5(1) of the Rules of the High Court 1980 which reads:

- 5(1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

The word “pleading” used in O. 20 r. 5(1) of the Rules of the High Court 1980 has, by virtue of O. 20, r. 7, been extended to include eg, a petition so that O. 20 r. 5 shall have effect in relation to a petition also.

The aforesaid powers of the court to grant or refuse leave to amend had been authoritatively stated in a good number of cases, one of which is the Federal Court decision in *Yamaha, supra*, which sets out the governing principles as follows:

1. whether the application is *bona fide*;
2. whether the prejudice to the other party can be compensated with costs;
3. whether the effect of the amendment would change the character of a suit to a suit of a different and inconsistent character.

In *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126 (at p. 129); [1987] CLJ (Rep) 126 (at p. 128), Abdul Hamid, Ag. LP, observed that all such amendments ought to be made for the purpose of determining the real questions in controversy between the parties to any proceedings as the object of the court is to decide on the rights of the parties.

- a* Upon a proper perusal of the proposed amendment as contained in para 7(2) and (3), it is to be observed that the proposed amendment consists of allegations of fact pertaining to the family business by both the petitioner and the respondent during their marriage, the employment of a maid and their respective contributions towards the business.
- b* Para 7(5) related the occasions when the respondent allegedly did not return home or communicate with the petitioner while para 7(7) referred to the respondent's share market trading activities.
- Para 7(8) revealed the petitioner's medical treatment, while para 7(10) alleged the nonpayment of director's fees to the petitioner as a director of one of their family companies.
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- Para 7(26) made a mention of the interim protection order obtained from the magistrate's court of Kuala Lumpur on 19 May 1999.
- d* I am of the view that the proposed amendment as outlined above pertains to matters which are relevant and therefore have to be resolved by the court in respect of the ancillary relief sought by the petitioner and are *bona fide*. The prejudice, if any, caused to the respondent can be compensated with costs. There is in my view no change in the character of the ancillary relief sought in the petition.
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- The proposed amendment as alluded to above, consists of allegations of facts which have to be established by way by proper *viva voce* evidence. Although it is true that the petitioner has given her evidence, the law allows the petitioner to be recalled for examination in chief, cross examination and reexamination pertaining to the proposed amendment. Parties are still at liberty to apply to the court for other witnesses to be called or recalled to adduce relevant and admissible evidence: s. 138(4) Evidence Act 1950.
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- In *Abdul Johari Abdul Rahman v. Lim How Chong & Ors* [1997] 1 CLJ 361 Abdul Malek Ahmad JCA (now FCJ) in delivering the judgment of the Court of Appeal said that however late the proposed amendment, it should be allowed if it can be made without injustice to the other side, and that there is no injustice if the other party can be compensated with costs.
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- At the end of the day, it is essentially the exercise of a discretion which is conferred upon the court and in the exercise of this discretion, the court has to rely on established judicial principles and to ensure that it is exercised judicially having regard to the facts and circumstances of each individual case.
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I am aware of Yong J's refusal of leave to amend the pleading in *Abu Bakar v. Mohamed Zain* [1967] 1 MLJ 168; and in *Lembaga Pelabuhan Johor v. The Pacific Bank Bhd* [1998] 1 CLJ 742 where Abdul Malik Ishak, J also refused leave to amend. Their Lordships were deciding on the exercise of the discretion by reference to the facts and circumstances in their respective individual cases.

On the facts and circumstances before me, and on the foregoing grounds I hold that the proposed amendment should be allowed. I therefore exercise my discretion and hereby grant leave to the petitioner to amend as proposed in encl. (49). The amended petition is to be served on the respondent's solicitor on or before 17 October 2001. The respondent is also granted corresponding leave to make the necessary and relevant amendment to his answers, if he is inclined to do so, within 28 days of this order ie, on or before 31 October 2001. Costs of this application to the respondent. The substantive matter pertaining to ancillary relief is now fixed for continued hearing on 7 January 2002 and 1-5 April 2001.

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